

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

REBECCA ANN HARRAH

Claimant

VS.

COFFEYVILLE REGIONAL MEDICAL CENTER

Respondent

AND

KANSAS HOSPITAL ASSOCIATION

WORKERS COMPENSATION FUND, INC.

Insurance Carrier

Docket No. 1,002,341

ORDER

Respondent appeals the January 15, 2009, Award of Administrative Law Judge Thomas Klein (ALJ). Claimant was found to be permanently and totally disabled due to injuries suffered on January 30, 2002. Claimant's disability was partially due to injuries suffered to her low back after a fall on the date of accident, and partially due to psychological disorders which developed from and as the result of the physical injuries.

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Wade A. Dorothy of Overland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. In addition, the parties agreed at oral argument to the Board that the Stipulation Regarding Average Weekly Wage filed with the Kansas State Workers Compensation Division (Division) on June 4, 2008, properly identifies claimant's average weekly wage, fringe benefit package and the date the fringe benefits are to be included in the average weekly wage. The Board will adjust the Award to accurately reflect the stipulated wage. The Board heard oral argument on May 15, 2009.

ISSUE

What is the nature and extent of claimant's injuries and disability resulting from the series of accidents, including the fall she suffered on December 20, 1999, with a stipulated final date of injury on January 30, 2002? Respondent argues that claimant's injuries resulted in a permanent partial general (work) disability of 33.5 percent, alleging that claimant has the ability to return to work within the restrictions placed on her by board certified orthopedic surgeon Jeffrey T. MacMillan, M.D. Claimant argues that she is permanently and totally disabled due not only to the physical injuries, but also to the psychological effects of those injuries.

FINDINGS OF FACT

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

Claimant worked for respondent as a monitor technician/nurse aide assistant when, on December 20, 1999, she was assisting a nurse put a tube down a patient's throat. The patient jerked, and claimant was thrown against a wall, suffering an injury to her low back. Claimant reported the accident and was provided conservative care. Claimant continued working for respondent until January 30, 2002, at which time she was taken off work by her family doctor, Dr. Patrick Allen. Claimant's conservative care included medication, physical therapy and steroid injections. X-rays were taken, and claimant underwent an MRI of her lumbar spine.

Claimant was referred by her attorney to board certified orthopedic surgeon Edward J. Prostin, M.D., for an examination on July 9, 2002. Claimant was diagnosed with a disc protrusion and spondylolisthesis at L5-S1 with intermittent left S1 radiculopathy. Dr. Prostin prescribed epidural steroid injections and anti-inflammatory medication, with the option of surgery being considered. Claimant was provided with work restrictions essentially limiting claimant to light-duty work, avoiding frequent bending or twisting, forceful pushing or pulling, use of vibrating equipment or captive positioning.

Claimant ultimately came under the care of Dr. MacMillan on March 30, 2006. Dr. MacMillan ordered new MRI and discography tests and concluded that claimant was a good candidate for surgery. On July 11, 2006, Dr. MacMillan performed a two-level posterior lumbar interbody fusion at L4 through S1. After surgery, claimant was referred for work conditioning, but the work conditioning actually worsened claimant's symptoms. Dr. MacMillan placed restrictions on claimant, limiting claimant to sedentary work. He determined that claimant had reached maximum medical improvement (MMI) on January 24, 2007, and rated her at 25 percent to the whole person, pursuant to the fourth

edition of the *AMA Guides*.¹ Dr. MacMillan reviewed the task list of vocational specialist Karen Terrill and determined claimant was unable to perform 12 of the 32 tasks on the list, for a 38 percent task loss. He continues to see claimant approximately every 4 months for ongoing medications. At the time of the doctor's deposition, claimant was on hydrocodone; Zanaflex, a muscle relaxer; Neurontin, a seizure medication for nerve-related discomfort; and Ambien to help her sleep. Dr. MacMillan agreed that most of these medications would make claimant drowsy. He also agreed the physical effects of the medications could make it difficult for claimant to work and could impair claimant's mental acuity. As of the last office visit, claimant had indicated her left leg pain had worsened. Because of that, Dr. MacMillan increased the strength of claimant's pain medication.

Claimant was returned to Dr. Prostic on February 20, 2007, for a second evaluation. Claimant was found to be post surgery, a two-level interbody fusion. Dr. Prostic administered the Minnesota Multiphasic Personality Interview (MMPI) with a determination that claimant was suffering from depression. Claimant also displayed significant deconditioning of her low back with complications from psychological factors. Claimant was rated at 25 percent to the whole body for the lumbar impairment, pursuant to the fourth edition of the *AMA Guides*.² In reviewing the task list of Karen Terrill, Dr. Prostic found claimant unable to perform 14 of the 32 tasks, for a task loss of 44 percent. Dr. Prostic opined that unless claimant could be relieved of her major depression, she is permanently and totally disabled from gainful employment.

Claimant was referred by her attorney to board certified psychiatrist and board certified independent medical examiner John Dennis Pro, M.D., for an evaluation on May 24, 2007. Dr. Pro subjected claimant to several psychological tests, with the results indicating claimant displayed a major depressive disorder. Because of claimant's ongoing pain, she was impaired both physically and psychologically. Ongoing psychological treatment was recommended. Dr. Pro initially determined that claimant could return to work, and in fact, testified that working might actually be therapeutic for claimant's depression. However, he later testified that with the combination of the physical and psychological impairments, claimant may not be able to handle the rigorous demands of a 40-hour work week. Dr. Pro then stated that claimant is more likely than not unemployable. Claimant was rated at 25 percent to the whole body for the psychological impairment pursuant to the second edition of the *AMA Guides*.³ Dr. Pro testified originally that the fourth edition referred to the second edition for rating purposes, but later changed his testimony regarding the referral by the fourth edition. He acknowledged that the fourth

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

² *AMA Guides* (4th ed.).

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2nd ed.).

edition specifically switched from numerical ratings to qualitative ratings, because the numerical rating applied a precision that was not there and provided a prognosis that was difficult to assess with people. Dr. Pro acknowledged that claimant had been diagnosed with depression in 1994 when her brother died, and again in 1996 at the time of her divorce. At both times, claimant was placed on anti-depression medication. There is no indication in this record that claimant continued on those medications at the time of her employment with respondent. In fact, Dr. Pro testified that claimant's medications for depression were restarted after the recent work-related injury while working for respondent.

Claimant was evaluated by vocational experts Karen Terrill and Dick Santner. Ms. Terrill determined that claimant was permanently and totally disabled from any substantial and gainful employment as the result of her physical condition combined with her psychological condition. Ms. Terrill also found it significant that claimant was taking significant medication for both her physical and psychological impairments. These medications would have a direct effect on claimant's ability to work.

Mr. Santner testified that claimant was capable of working within the restrictions of Dr. Prostic and Dr. MacMillan. But Mr. Santner was unable to identify the medications claimant was taking as the result of these injuries. He agreed he was unaware of the effect these medications would have on claimant's mental capacity, deferring to the opinions of the treating physicians instead.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

⁴ K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 44-501(a).

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁷

Claimant suffered serious injury as the result of the traumatic incident on December 20, 1999, and the ongoing insult to her body with her return to work through January 30, 2002, the stipulated date of accident in this matter. Both Dr. Prostic and Dr. MacMillan found, and the Board agrees, that claimant suffered a 25 percent whole body impairment on a functional basis from that accident. The impairment assessed for claimant's psychological impairment creates a more problematic question.

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁸

The Kansas Supreme Court has long held that traumatic neurosis, as well as other psychiatric problems are compensable. "It is firmly established in this jurisdiction that traumatic neurosis, following physical injury and shown to be directly traceable to the injury, is compensable under the Workmen's Compensation Act."⁹ However, the Court in *Berger* cautioned:¹⁰

Even though this court has long held that traumatic neurosis is compensable; we are fully aware that great care should be exercised in granting an award for such injury owing to the nebulous characteristics of a neurosis. An employee who predicates a claim for temporary or permanent disability upon neurosis induced by trauma, either scheduled or otherwise, bears the burden of proving by a preponderance of the evidence that the neurosis exists and that it was caused by an accident arising out of and during the course of his employment.¹¹

⁷ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

⁸ K.S.A. 44-510e(a).

⁹ *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, rev. denied 265 Kan. 884 (1998); citing *Jacobs v. Goodyear Tire & Rubber Co.*, 196 Kan. 613, 412 P.2d 986 (1966).

¹⁰ *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 506 P.2d 1175 (1973).

¹¹ *Berger* at 550.

The connection between claimant's physical injuries suffered in this matter and the psychiatric problems which developed is well established in this record. The only dispute surrounds the assessment of an impairment for that condition. Dr. Pro assessed a 25 percent whole body impairment for the psychological condition, citing the second edition of the *AMA Guides*. However, statutorily the fourth edition is the version required by the legislature under K.S.A. 44-510e. The statute requires the use of the fourth edition **if the impairment is contained in the fourth edition**. Here, Dr. Pro testified that the fourth edition does not provide a number, as the numerical ratings were discontinued due to the difficulty in assessing a prognosis with people. In workers compensation litigation, the fact finder must reach a determination as to the level of impairment, both physical and psychological. Without a number value, the measurement of a claimant's impairment cannot be determined under the Act. The Board finds that Dr. Pro's use of the second edition does not violate the statutory restrictions requiring the use of the fourth edition. To so narrowly interpret the statute would prevent the determination of a functional impairment for psychological disabilities. If the legislature had intended to eliminate psychological impairments, it would have done so. The Board finds that claimant suffered a 25 percent whole body disability from the psychological impairment. The ALJ, using the Combined Values Chart of the *AMA Guides*,¹² went on to find claimant had suffered a 44 percent whole body impairment. The Board affirms that finding.

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.¹³

The medical evidence in this record would allow claimant to return to work with restrictions based on her physical injuries. However, the addition of claimant's medications and psychological impairment restricts claimant's ability to function in a work environment to the point that she is realistically unemployable.¹⁴ When combining claimant's physical limitations with her lack of training, the extensive medication she is required to take and the psychological effects resulting from these injuries, claimant does not have the ability to obtain and retain substantial and gainful employment in the open labor market. According to Dr. Pro, with the right psychological treatment, claimant may one day return to a job, but she cannot do so at this time.

¹² *AMA Guides* (4th ed.).

¹³ K.S.A. 44-510c(a)(2).

¹⁴ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to reflect the stipulated average weekly wage, but otherwise affirmed, including the fact that claimant is permanently and totally disabled.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas Klein dated January 15, 2009, should be, and is hereby, modified to reflect the correct average weekly wage, but affirmed in all other regards.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rebecca Ann Harrah, and against the respondent, Coffeyville Regional Medical Center, and its insurance carrier, Kansas Hospital Association Workers Compensation Fund, Inc., for an accidental injury which occurred January 30, 2002, based on an average weekly wage through January 31, 2007, of \$375.81 and an average weekly wage of \$488.97 effective February 1, 2007.

Claimant is entitled to 50.57 weeks temporary total disability compensation at the rate of \$250.55 per week totaling \$12,670.31, followed by permanent total disability compensation at the rate of \$250.55 per week through January 31, 2007, followed by permanent total disability compensation at the rate of \$326.00 per week effective February 1, 2007, not to exceed \$125,000.00 for a permanent total general body disability.

As of May 18, 2009, there would be due and owing to claimant 50.57 weeks of temporary total disability compensation at the rate of \$250.55 per week in the sum of \$12,670.31, followed by 210.29 weeks of permanent total disability compensation at the rate of \$250.55 per week in the sum of \$52,688.16, followed by 119.71 weeks of permanent total disability compensation at the rate of \$326.00 per week in the sum of \$39,025.46, for a total due and owing of \$104,383.93, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$20,616.07 shall be paid at \$326.00 per week until fully paid or until further order of the Director.

Although the ALJ's Award approves claimant's contract of employment with her attorney, the record does not contain a filed fee agreement between claimant and

claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.¹⁵

IT IS SO ORDERED.

Dated this ____ day of May, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

¹⁵ K.S.A. 44-536(b).